No. 80-1347

Office-Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1980

THOMAS G. DIORIO and PHILIP A DIORIO,

Petitioners,

vs.

KREISLER-BORG CONSTRUCTION CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

IRVING ANOLIK
Attorney for Petitioners
225 Broadway
New York, New York 10007
(212) 732-3050

4579 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

QUESTIONS PRESENTED

1. Whether petitioners were deprived of property without due process of law by reason of the fact that a judgment by default was entered against them without proper notification and without an opportunity to be heard on the merits (Fourteenth Amendment, United States Constitution)?

2. Whether the state nisi prius court deprived petitioners of property without due process of law by violating the New York statutory provisions governing entry of judgments of an unliquidated sum, by reason of the fact that it failed to hold a hearing on damages [Fourteenth Amendment, United States Constitution and New York CPLR §3215(a)]?

3. Whether petitioners were denied due process of law by the nisi prius court's action in entering a default judgment without notice to them, after they ceased to be represented by counsel, which counsel had to withdraw from the case by reason of illness (Fourteenth Amendment, United States Constitution)?

PARTIES

The parties in the New York Supreme Court, Appellate Division, Second Department were Kreisler-Borg Construction Co., Inc., plaintiff-respondent (respondent herein); Thomas G. Diorio and Philip A. Diorio, defendants-appellants (petitioners herein); and Elite Concrete Construction Corp., as well as Joseph L. Colosimo and Anthony R. Colosimo, defendants.

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No.

In The

Supreme Court of the United States

October Term, 1980

THOMAS G. DIORIO and PHILIP A. DIORIO,

Petitioners,

vs.

KREISLER-BORG CONSTRUCTION CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

OPINIONS BELOW

A copy of the nisi prius court's (New York Supreme Court, Westchester County) opinion is annexed as an appendix, as is the decision of the New York Supreme Court, Appellate Division, Second Department, published September 12, 1980 and December 10, 1980.

Opinions relevant to this petition are the opinion of the trial court per Justice Morrie Slifkin, dated December 20, 1979,

denying vacatur of the default judgment, and order of Justice Morrie Slifkin dated October 31, 1979, denying a motion to vacate the judgment of default; the order of the Appellate Division, Second Department, dated May 19, 1980, affirming the judgment of the Supreme Court, Westchester County; the order of the Appellate Division, Second Department, dated September 9, 1980, denying leave to appeal to the Court of Appeals; and, the order of the Appellate Division, Second Department, dated December 9, 1980, denying rehearing and reargument of the appeal of the order affirming the judgment of conviction and denying leave to appeal to the Court of Appeals, all appended.

JURISDICTION

(a) The judgment sought to be reviewed was dated the 29th day of October 1979. It granted on default a judgment in favor of respondent and against petitioners, in the amount of $71,765.45. A motion for reargument was made and granted by the Supreme Court, Westchester County, but upon reargument, the original determination that the default judgment should stand was adhered to.

(b) By order dated the 19th day of May 1980, the Appellate Division, Second Department, affirmed the judgment of the Westchester Supreme Court, without opinion. By order published September 12, 1980, the Supreme Court Appellate Division, Second Department denied reargument and rehearing of the order affirming the judgment of the Supreme Court, Westchester County, and also denied leave to appeal to the Court of Appeals.

By order published December 9, 1980, the Supreme Court Appellate Division, Second Department denied a rehearing and reargument of the order denying leave to appeal and denying a vacatur of the order published September 12, 1980.

(c) Jurisdiction to review the judgment in question by certiorari is conferred by 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause of the Fourteenth Amendment (Section 1):

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York CPLR §3215, Default Judgment:

> "(a) *Default and entry.* When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of

rule 305, plus costs and interest. Upon entering a judgment against less than all defendants, the clerk shall also enter an order severing the action as to them. When a plaintiff has failed to proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the defendant may make application to the clerk within one year after the default and the clerk, upon submission of the requisite proof, shall enter judgment for costs. Where the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment."

STATEMENT OF THE CASE

A default judgment was entered against the petitioners in the Supreme Court, Westchester County on the 29th day of October 1979, awarding a judgment in favor of respondent, in the sum of $71,765.45.

A motion for reargument of the default judgment and application to vacate it was made and granted by Judge Slifkin of the Westchester Supreme Court, but on December 20, 1979, he adhered to his original determination and vacatur was denied.

The action in the complaint was upon a contract in which respondent sought recovery of so-called "back charges" arising out of an agreement entered into on August 6, 1961 between respondent, as general contractor on a project known as "Stuyvesant Apartment House", and the corporate defendant, Elite Concrete Construction Corp., wherein said defendant agreed to act as sub-contractor in the construction of a "concrete superstructure" at an agreed price of $302,000.

In connection with this agreement, the petitioners, and the aforesaid defendants, Anthony Colosimo and Joseph Colosimo, executed a purported guarantee of the corporate defendant's performance and completion of the work forming the subject of the agreement.

The corporate defendant received $297,549.01, representing nearly full payment of the contract, from the respondent herein.

Respondent, however, following completion of the work, withheld final payment and claimed an overpayment had been made to the corporate defendants by reason of its alleged failure to complete the contract.

In this connection, respondent commenced an action in May of 1963, against the corporate defendant, as well as against the petitioners Diorio, and the defendants Colosimo.

It was agreed, among the defendants, that a single lawyer would represent them all, which lawyer turned out to be Joseph C. Matera, Esq.

During the course of litigation, petitioners Diorio went to Puerto Rico in connection with a construction project, with the distinct understanding that the litigation would be actively defended.

During their residence in Puerto Rico, and while the litigation was progressing, their attorney, Matera, became ill and had to withdraw from the case. No attorney was substituted in their behalf and petitioners were completely unaware that they were unrepresented by counsel.

It was in this context that a default judgment was ultimately entered.

The court added to the injustice, despite the fact that the sum involved was an unliquidated amount. A hearing was required in the nature of an inquest, at the very least, before a judgment by default for damages could be awarded. It was therefore jurisdictionally defective.

REASONS FOR GRANTING THE WRIT

I.

Petitioners were denied due process and equal protection of the laws in violation of the Fourteenth Amendment, by reason of the fact that a default judgment for a substantial amount of money was taken against them after their counsel became ill and withdrew from the case, and without notice to them of what was about to occur.

Every person whose interests are involved in civil litigation is entitled, as of constitutional due process, to such notice of events taking place in their lawsuit as is reasonably calculated to apprise him of litigation. The Supreme Court of the United States in *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 94 L. Ed. 865, 873, aptly said:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L. Ed. 865, 873 (1950).

Illustratively, the Supreme Court has invalidated an adoption decree for want of due process when a divorced father with visitation rights to his child was not notified of adoption proceedings affecting his child. Said the Court: "Failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law." *Armstrong v. Manzo*, 380 U.S. 545, 14 L. Ed. 2d 62, 65 (1965).

The United States Supreme Court, through Justice Holmes, once ruled that the best possible form of substituted service must be used, if personal service is not made within the jurisdiction. Justice Holmes stated: "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." *McDonald v. Mabee*, 243 U.S. 90, 61 L. Ed. 608 (1917).

The Supreme Court has observed:

> "The general rule that emerges from the Mullane Case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." *Schroeder v. New York City*, 371 U.S. 208, 9 L. Ed. 2d 255, 259 (1962).

In the case at bar, a letter was sent, but was received by a person other than the petitioners herein and, consequently, we maintain that no notification was given that would conform to due process (*Nelson v. New York*, 352 U.S. 103, 1 L. Ed. 2d 171).

One of the most essential rights of any litigant or of any

person, is that he have his "day in court" and as a corollary to that, an opportunity to be heard, as a matter of right, *on the merits.*

The United States Supreme Court has referred to "the right to be heard" as "one of the most fundamental requisites of due process."[1] Again, it has stated: "A fundamental requirement of due process is the opportunity to be heard."[2]

When the Missouri court refused to hear a person on the merits of his claim by announcing a new rule that required prior recourse to an administrative agency, at a time when such appeals had already run, the United States Supreme Court held that the Missouri court had, in so repudiating its earlier position, "denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right."[3] "It is plain," observed the court, "that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense. . . . by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property."[4]

When the Supreme Court of the District of Columbia attempted to deprive a defendant of his right to answer a suit

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1. *Schroeder v. New York City*, 371 U.S. 208, 9 L. Ed. 2d 255, 259 (1962).

2. *Armstrong v. Manzo*, 380 U.S. 545, 14 L. Ed. 2d 62, 66 (1965).

3. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 74 L. Ed. 1107, 1112 (1930).

4. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 74 L. Ed. 1107, 1112, 1113 (1930).

brought against him, and struck his answer, then entered judgment against him, because of his refusal to deliver to a court-appointed receiver certain funds which were the subject of the litigation, a New York court refused to honor the judgment and it was affirmed by the United States Supreme Court which ruled that the first court had deprived the defendant of his property without due process of law by denying him his constitutional right to a day in court.[5]

One who has passed a bar examination is entitled to a fair hearing before being denied membership in the state bar.[6]

The Court of Appeals for the Fifth Circuit has ruled that due process of law requires that a student be given notice and hearing before being expelled from a state institution.[7]

The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right might be but a barren one. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposal before it issues its final command.[8] At times, however, parties in litigation with the federal government may be denied access to

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5. *Hovey v. Elliott*, 167 U.S. 409, 42 L. Ed. 215 (1897).

6. *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 10 L. Ed. 2d 224, 2 A.L.R. 3d 1254 (1963).

7. *Dixon v. Alabama State Board of Education*, 294 F. 2d 150, *cert. den.* 368 U.S. 930, 7 L. Ed. 2d 193, noted in 14 Ala. L. Rev. 126 (1961).

8. *Morgan v. United States*, 304 U.S. 1, 82 L. Ed. 1129 (1938).

government papers and documents affecting the case. Thus, in a five-to-four 1960 decision, the Supreme Court ruled that failure to allow an applicant for a conscientious objector classification to have a view of the FBI report and of the hearing officer's report did not deny him due process of law.[9] According to Chief Justice Warren, and Justices Black, Brennan and Douglas, the party's "right to a full hearing" was denied by such refusal.

What is constitutionally mandated as part of procedural due process in civil situations will vary from one kind of proceeding to another. "The nature of the process that is due is not subject to rigid definition," says one federal court. Another adds: "The standards of procedural due process are not wooden absolutes. The sufficiency of procedures employed in any particular situation must be judged in the light of the parties, the subject matter and the circumstances involved." *Ferguson v. Thomas,* 430 F. 2d 852 (C.A. 5, Tex. 1970).

The Supreme Court has said that disbarment is a penalty imposed upon a lawyer, adding: "He is accordingly entitled to procedural due process, which includes fair notice of the charge." *Re Ruffalo,* 390 U.S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222, *reh. den.* 391 U.S. 961, 20 L. Ed. 2d 874 (1968).

It is "fundamental," says the Supreme Court, "that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin,* 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983, *reh. den.* 409 U.S. 902, 34 L. Ed. 2d 165 (1972).

The Supreme Court held in 1972 that a state had failed to provide notice "reasonably calculated" to apprise a citizen of litigation affecting his interests, when in instituting forfeiture

9. *Gonzales v. United States,* 364 U.S. 59, 4 L. Ed. 2d 1569, 80 S. Ct. 1554, *reh. den.* 364 U.S. 856, 5 L. Ed. 2d 80 (1960).

proceedings it sent notice to the person's home, when the state knew the person was in jail at the time, and it was undisputed that the person incarcerated did not receive the notice sent to his home. *Robinson v. Hanrahan,* 409 U.S. 38, 34 L. Ed. 2d 47 (1972).

The Supreme Court reminds us that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." The notice and hearing, says the Court, must be "appropriate to the nature of the case," adding: "[d]ue process does not, of course, require that the defendant in every civil case actually have a hearing on the merits." By way of illustration, the Court suggests that a state can enter a default judgment "against a defendant who, after adequate notice, fails to make a timely appearance, . . . or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication." The Court further states that "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." So stating, the Court ruled that due process was violated when indigents in Connecticut were unable to sue for divorces because of state requirements that they pay filing and service fees. *Boddie v. Connecticut,* 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971).

Garnishment laws are unconstitutional as violative of due process when they deprive a worker of the use of his earned wages at the suit of a claimed creditor without notice and an opportunity to be heard before such wages are tied up or turned over to the claimed creditor.[10]

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10. *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 23 L. Ed. 2d 349 (1969).

A state which terminates public assistance payments to a recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment. The Court added that the recipient had the right to present evidence orally and to cross-examine adverse witnesses, and, finally, that the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing.[11]

The Supreme Court has held that a citizen has the right to notice and hearing before his name is posted, under a state statute, as one to whom liquor can not be sold nor given.[12]

The Court in 1971 held that a state may not deprive a citizen of his driver's license and vehicle registration without first providing him with a hearing to include determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident.[13]

A federal court has held that when university officials have reasonable cause to believe that danger will be present if a student is permitted to remain on campus pending a decision following a full hearing, an interim suspension may be imposed, but "an interim suspension may not be imposed without a prior preliminary hearing, unless it can be shown that it is impossible or unreasonably difficult to accord it prior to an interim suspension. Moreover, even when it is impossible or unreasonably difficult to accord the student a preliminary hearing prior to an interim suspension, procedural due process

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11. *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287 (1970).

12. *Wisconsin v. Constantineau*, 400 U.S. 433, 27 L. Ed. 2d 515 (1971).

13. *Bell v. Burson*, 402 U.S. 535, 29 L. Ed. 2d 90 (1971).

requires that he be provided such a preliminary hearing at the earliest practical time." *Stricklin v. Regents of University*, 297 F. Supp. 416, 420, *app. dismd.* (CA7) 420 F. 2d 1257 (D.C. Wis., 1969).

The Supreme Court has indicated that a non-tenured teacher may have a "property" right that entitles him to procedural due process, including a hearing, before school authorities indicate the relationship is terminated, if he can show "a legitimate claim of entitlement to job tenure" as by proof that there is an unwritten "common law" at the particular educational institution that employees shall have the equivalent of tenure. *Perry v. Sinderman*, 408 U.S. 593, 33 L. Ed. 2d 570 (1972).

The Court of Appeals for the Fourth Circuit has said that "continuous employment over a significant period of time—such as appellant's 29 years—can amount to the equivalent of tenure. When it does, dissolution of the relationship requires prior notice and an opportunity to be heard."

The Supreme Court has said that "the right to present evidence is, of course, essential to the fair hearing required by the due process clause." *Jenkins v. McKeithen*, 395 U.S. 411, 23 L. Ed. 2d 404, 89 S. Ct. 1843, *reh. den.* 396 U.S. 869, 24 L. Ed. 2d 123 (1969).

In the case at bar it must be borne in mind that the petitioners were away in Puerto Rico when their lawyer, Matera, became ill and withdrew from the case. They were unaware of the fact that they no longer had representation and, consequently, their interests in the litigation was no longer being protected. The notification allegedly sent and received by a relative of petitioners was inadequate notification because it was sent to Puerto Rico and petitioners had already left.

The deprivation of counsel in itself was so egregious as to warrant the granting of certiorari in itself, let alone the other issues involved herein.

Finally, the court at nisi prius arrogated to itself the right to enter a default judgment on an unliquidated sum without a hearing or inquest, and this, too, was jurisdictionally defective under the CPLR §3215(a).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioners

APPENDIX

ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT DATED DECEMBER 9, 1980

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 9, 1980.

Hon. Lazer, Justice Presiding.
Hon. Gibbons
Hon. Rabin
Hon. O'Connor,
Associate Justices.

KREISLER-BORG CONSTRUCTION CO., INC.,

Respondent,

v.

ELITE CONCRETE CONST. CORP.,

Defendant-Appellant.

Motion by appellant for leave to appeal to the Court of Appeals from an order of this court dated Sept. 9, 1980, which denied reargument of the appeal from an order of the Supreme Court, Westchester County, entered Dec. 21, 1979, which was affirmed by order dated May 19, 1980.

Motion denied, with $20 costs.

ENTER

Clerk, Appellate Division.

ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT DATED SEPTEMBER 9, 1980

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on September 9, 1980.

Hon. Lazer, Justice Presiding.
Hon. Gibbons
Hon. Rabin
Hon. O'Connor,
Associate Justices.

KREISLER-BORG CONSTRUCTION CO., INC.

Respondent,

v.

ELITE CONCRETE CONSTRUCTION CORP.,

Defendant.

Motion by appellants (1) for reargument of the appeal from an order of the Supreme Court, Westchester County, entered Dec. 21, 1979, or in the alternative (2) for leave to appeal to the Court of Appeals from an order of this court, dated May 19, 1980, which decided the appeal. Motion denied, with $20 costs.

ENTER

Clerk, Appellate Division.

ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT DATED MAY 19, 1980

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 19, 1980.

HON. LAZER, Justice Presiding.
HON. GIBBONS
HON. RABIN
HON. O'CONNOR

Associate Justices

KREISLER-BORG CONST. CO., INC.,

Res.

v.

ELITE CONCRETE CONST. CORP.,

Def.

Appeal by appellants from an order of the Supreme Court, Westchester County, entered the 29th day of October, 1979, granting a default judgment in favor of plaintiffs against appellants affirmed.

ENTER

s/ Irving N. Selkin
Clerk of Appellate Division

OPINION OF SUPREME COURT OF THE STATE OF NEW YORK, WESTCHESTER COUNTY

SUPREME COURT — STATE OF NEW YORK
SPECIAL TERM, PART I, WESTCHESTER COUNTY

Present:
Hon. MORRIE SLIFKIN
Justice

KREISLER-BORG CONSTRUCTION CO., INC.

Plaintiff,

-against-

ELITE CONCRETE CONSTRUCTION CORP., PHILIP A. DIORIO, THOMAS G. DIORIO, JOSEPH L. COLOSIMO and ANTHONY R. COLOSIMO,

Defendants.

INDEX
NUMBER 9072, 1964

MOTION
DATE 10/30, 1979

MOTION
CAL. NUMBER 16

The following papers numbered 1 to 6 read on this motion to open a default judgment entered October 29, 1979.

Opinion

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Upon the foregoing papers it is ordered that this motion is denied. Upon the papers submitted on this motion, the Court remains unconvinced that the default was excusable. Even if not willful, the default was the result of callous disregard for the workings of the judicial system. Movant's reliance upon an alleged oral understanding that a co-defendant's attorney would protect his interests is an unsupported, self-serving declaration that, even if true, would not serve as a reasonable excuse. Moreover, defendant's failure to recollect whether he was served with the order relieving his then counsel because of counsel's illness, his failure to even inquire as to the outcome of this litigation and his failure to explain his exact whereabouts during the intervening years militate against the Court's exercise of discretion with respect to this motion.

So Ordered.

Dated: Oct. 31, 1979

MORRIE SLIFKIN, J.S.C.

No. 80-1347

IN THE

Supreme Court of the United States

October Term, 1980

THOMAS G. DIORIO and PHILIP A. DIORIO,

Petitioners,

vs.

KREISLER-BORG CONSTRUCTION CO., INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK & FRANK
Attorneys for Respondent
11 Park Place
New York, N. Y. 10007
(212) 962-5387

IRVING FRANK
Of Counsel
11 Park Place
New York, N. Y. 10007
(212) 962-5387

MICHAEL J. MARINO
With him on the Brief

QUESTIONS RESTATED BY RESPONDENT

1. Whether there is any question of "due process of law" raised by the refusal of the New York State Supreme Court to vacate a default judgment, where it appears from the record, that the petitioners waited nine years, after they had received actual written notice that the default judgment had been entered against them, before making application to have the judgment vacated and where it further appears that, approximately one year before the default was entered the petitioners had received actual written notice that the attorney of record, who appeared for them in the action, had been permitted to withdraw because of illness, and petitioners did nothing about it ?

2. Whether any question of constitutional law is raised, where it appears that the State Court which denied the application to vacate the default judgment, nine years after the entry of the judgment, had made findings of fact that

a) the judgment was regular on its face;

b) that the petitioners' allegations to excuse the delay were not credible;

c) that the petitioners had shown a callous disregard of the workings of the judicial system, and

d) they were guilty of laches ?

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STATEMENT OF THE CASE IN OPPOSITION

The main premise, upon which the present petition is based, is a claim made by the petitioners Philip A. Diorio and Thomas G. Diorio, that the Supreme Court of the State of New York, Westchester County, had wrongfully decided a motion made by the petitioners in 1979 to vacate a judgment entered against them on October 29, 1970. (R-3,9) In the petition, the date of the default judgment is erroneously referred to as 1979 in several places. As will be seen later, the date is significant for a full understanding of the facts. The petition alleges that the default judgment had been entered against them, after their attorney, Joseph C. Matera, Esq., had withdrawn from the case because of illness " . . without notice to them of what was about

to occur" (Pet. P.4). All of the law presented in the petition is addressed to the issue of "Notice".

In the Courts below, there was presented as an issue of fact, whether any kind of notice had been given, and as an issue of law, whether the notice, the petitioners' received was adequate to afford them an opportunity to defend themselves. Had there been a finding that as a matter of fact, that no notice was given, or if some notice was given, that the notice was inadequate, then the issue of law should have been resolved in favor of the petitioners. However, the record below clearly shows that actual notice in writing had been sent to each of the petitioners; the notice was actually received and the notice was adequate to advise them of what was about

to happen. Based on the entire background of the case, the issue of fact and the issue of law had to be resolved in favor of the respondent, Kreisler-Borg.

The petition has been framed in such fashion, so as to present what might be regarded as a colorable argument, to make it appear as though the Courts below had erroneously denied a timely application to vacate a default judgment, where the petitioners' lawyer, unbeknownst to them had become ill. The facts which are included in the petition and those facts which have been omitted from the petition, might permit that colorable inference to be drawn. It is stated in the petition, that the Writ of Certiorari is sought to reverse a judgment entered in the Supreme Court,

Westchester County, on October 29, 1979.

That date of 1979 appears in the petition before this Court at several places, on (p.2) (the judgment sought to be reversed); on (p.4) in the first paragraph under Statement of the Case; and in the petitioners' appendix pp. 4a, 5a ". . . that the motion was being made to open a default judgment dated October 29, 1979." (Underscoring added).

The petitioners have further obscured the real dates, in the presentation of the petition, by omitting from their appendix the Order of Judge Morris Slifkin, dated December 20, 1979. (R-1) In that Order, Judge Slifkin permitted the petitioners leave to reargue their first application, which had been returnable on October 30, 1979. (Pet. 5a) He then adhered to his original decision of October 30, (R-1)

1979, which denied their application to vacate the judgment entered October 29, 1970, nine years prior to the application. (R-3,9)

HISTORY OF THE LITIGATION

The litigation between the parties to this proceeding began in 1963. Kreisler-Borg, the respondent, as plaintiff, commenced a civil action at law, to recover damages for breach of contract in the Supreme Court of the State of New York, Westchester County. There were five defendants, Elite Concrete Construction Corp., the two Diorio brothers, the petitioners herein, and two Colosimo brothers, who are not involved in this proceeding. All of the individuals had given their written guarantees to Kreisler-Borg, who was a general

contractor. The corporate defendant Elite, made an assignment for the benefit of creditors and failed to appear in the action. One of the Colosimo brothers retained his own attorney. The other Colosimo brother, at the outset, appeared by the same attorney as the Diorios. (R-4) Later, this Colosimo brother retained his own attorney. (R-5)

In January 1965, during the course of the pre-trial proceedings in the State Court, Philip A. Diorio filed a Voluntary Petition in Bankruptcy, in the United States District Court for the Southern District of New York. He was duly adjudicated. He was represented by counsel, who immediately obtained a stay of the State Court proceedings from the Referee in Bankruptcy, pending the adjudication of Philip's Discharge in

Bankruptcy. The issue of Philip's Discharge was not finally determined until some time in 1969, approximately 4 1/2 years after his petition was filed.

The petition states that the two Diorios were not in New York State when their attorney in the State Court action became ill, because they had gone to Puerto Rico in connection with a construction project. (Pet. p.5) The fact is, that both of them left almost immediately after the stay of prosecution of the State Court action was granted by the Bankruptcy Court Referee. Philip A. Diorio refused to return for over two years. The result was that both the bankruptcy proceeding and the State Court action were delayed because of his tactics.

Philip A. Diorio's Discharge in Bankruptcy was ultimately denied after a full trial, before the Referee in Bankruptcy, of the Specifications of Objections, filed by Kreisler-Borg, which is named as the respondent in this proceeding. In re Diorio 297 F. Supp. 842 (D.C. N.Y., 1968) unanimously affirmed, 407 F 2d. 1330 (CA 2d 1969).(1)

Even before the Court of Appeals affirmed Judge Mansfield's Order denying

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(1) It should also be noted, that although we did not bring the fact to the attention of the Judge in the Court below, nor to the attention of the Appellate Division in N.Y., the matter in the Federal Court did not end at that point. Philip A. Diorio was convicted of violation of 18 USCA 152. The Court of Appeals unanimously affirmed, 451 F 2d 21 (CA-2d, 1971), Cert. denied 405 U.S. 955, 92 S. Ct. 1173, 31 L. Ed. 2d 232 (1972); cited with approval, U.S. v. Bray 546 F 2d 851, 857 (CA 10, 1970); U.S. v. Alberico 453 F. Supp. 178, 187 (D.C. Colo., 1977).

the Discharge, In re Diorio, *supra*, Kreisler-Borg's counsel, obtained an Order to dissolve the injunction, so that Kreisler-Borg could continue the prosecution of the State Court action.(R-6) While the pre-trial proceedings in the State Court action were still in progress, Joseph C. Matera, Esq., who was the attorney representing the two Diorios, and one of the Colosimos, applied to Special Term of the Supreme Court in Westchester County, on written notice to all of the parties, for leave to withdraw as their attorney because of ill health. The Court at Special Term, granted the application with a direction to the outgoing attorney, to serve a a copy of that Order on all of the parties.(R-4) It allowed the Diorios 30 days within which to obtain new counsel.

In the light of the proceedings up to that time, counsel for Kreisler-Borg recognized that his client might someday be faced with the problem of having to prove that the Diorios had received notice, because they could claim they did not know that their attorney had been forced to withdraw because of illness. The proceedings in the Bankruptcy Court had shown that they were capable of distorting the facts to suit their own convenience. Although he had no obligation to do so, counsel for Kreisler-Borg sent each of the Diorios a certified copy of the Order, with notice of entry in the Office of the County Clerk, Westchester County. The Orders were mailed by certified mail return receipt requested. *(R-9-13)* Each of them was addressed to the last address that was on record, as they had given it to their attorney,

Joseph C. Matera, Esq. Each of the receipts were returned by the U.S. Postal Service, postmarked "Santurce, Puerto Rico L 01ZA, March 1, 1969". In each case, the receipts were signed personally by the petitioner, Thomas G. Diorio. *(R-10,11)* The Colosimo brother, who had been represented by Mr. Matera, retained new counsel. The Diorios did not.

Several months after the Diorios had received notice that their attorney had obtained permission to withdraw, and after their time to obtain new counsel had expired, the case was finally called on the Trial Calendar. Although the Colosimo brothers had retained a new attorney, who had entered his appearance for them, none of the defendants appeared on the call of the Trial Calendar. Kreisler-Borg, the plaintiff, appeared

by its attorney and with Mr. Robert F. Borg, the president, as the first witness. Kreisler-Borg answered that the plaintiff was ready. The Trial Court found that all of the defendants were in default. The calendar was so marked at the direction of the Court. Kreisler-Borg and its counsel waited until the entire calendar was called. Counsel for the plaintiff discussed with the Trial Judge the nature of the action, the nature of the breach of contract, and the nature of the plaintiff's damages. The verified pleadings were before the Court. The Trial Court directed the plaintiff's counsel to prepare a written Order for the entry of the judgment by default. *(R-6)* After the Trial Judge signed the Order directing the entry of the default judgment, Mr. Robert F. Borg, the plaintiff's president, a licensed

professional engineer, with many years of experience in the construction industry, returned to the Court House, and testified under oath, before the Clerk of the Court, with respect to the items of damage. The Clerk of the Court, computed the items of the plaintiff's damages. After taxing the plaintiff's Bill of Costs, the Clerk completed the judgment, prepared by plaintiff's counsel, filling in the amount of the damages, interest and costs as computed by the Clerk, in the Clerk's own handwriting. *(R-8)*

On page 14 of the petition, the petitioners complain that the default judgment was jurisdictionally defective under the New York Statute, CPLR § 3215 (a). This argument was raised in the Courts below and was fully briefed.

The entry of default judgments in New York is governed by statute. The CPLR spells out the procedure for the entry of judgment under varying circumstances. It permits entry of judgment where the plaintiff's claim is for a sum certain, or for a sum of money which can by computation be made certain, by making application to the Clerk within one year after the default, for the entry of judgment for the amount demanded in the complaint plus interest and costs

In the original proceedings, which culminated in the judgment dated October 29, 1970, (R-3) the plaintiff had complied with all of the requirements of the New York Statute concerning the entry of judgments by default where a party has appeared in the action and defaulted at the time of trial. The statute provides:

"§.3215. Default Judgment

(a) Default and entry. When a defendant has failed to ... proceed to trial of an action reached and called for trial... the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint plus costs and interest... Where the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment.

(b) Procedure before court. The court, with or without a jury, may make an assessment or take an account or proof, or may direct a reference. When a reference is directed, the court may direct that the report be returned to it for further action, or, except where otherwise prescribed by law, that judgment be entered by the clerk in accordance with the report without any further application. Except in a matrimonial action, no finding of fact in writing shall be necessary to the entry of a judgment on default. The judgment shall not exceed in or differ in type from that demanded in the complaint.

. . .

(e) Proof. On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint ... and proof by affidavit made by the party of the facts constituting the claim, the default and the amount due. Where a verified complaint has been served it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or his attorney.

(f) Notice.

1. Notice is not required when the judgment may be entered by the clerk ... The court may also dispense with the requirement of notice when a defendant who has appeared has failed to proceed to trial of an action reached and called for trial.

(Underscoring added)

Kreisler-Borg, as plaintiff had fully complied with all of the procedural requirements of the New York Statute which made ample provision to safeguard the "due process" rights of

the petitioners.

There was nothing presented in the court below, or in this court, in any of the papers submitted by the petitioners,which would overcome the presumption of the validity of the entry of the judgment. No facts were produced, which indicate that there was anything done with respect to the entry of the Judgment on Default, which did not comply with the statute.

After the Default Judgment was entered in the Office of the County Clerk Westchester County, counsel for Kreisler-Borg served upon all of the parties certified copies of the Order Directing the Entry of Judgment. Service was made by certified mail return receipt requested. Copies of these papers were also served upon

Arthur I. Trager, Esq.,the new attorney who had been retained to represent both of the Colosimo brothers. All of the notices were received. The United States Postal Service returned the signed receipts which acknowledged the delivery with respect to the petitioners. The receipts were signed in each case by Catherine Diorio, the "wife" of the petitioner, Philip A. Diorio.[2] Each of these receipts was postmarked"Santurce, Puerto Rico L 01ZA Sta. Nov 5, 1970". The receipts were numbered 078750 and 078751.(*R-12,13*)

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2. Catherine Diorio, a/k/a Catherine Gerber, a/k/a Catherine Contino, had been the office manager or secretary at the office of the defendant, Elite Concrete Construction Corp. Although she may not have been legally married to Philip A. Diorio, they held themselves out to be husband and wife. The background of this is mentioned in the opinion of Judge Mansfield, In re Diorio, *supra*, at p. 844, 847.

Neither Kreisler-Borg, nor its counsel heard from the Diorios for almost nine years. On the other hand, counsel for the Colosimos, immediately after receiving the judgments against his clients, made a written application to the Court to vacate the default because he, the attorney, had overlooked the trial date. The Court granted the application on December 14, 1970, as both timely and excusable. The action as against the Colosimos was severed from the action against all of the other defendants. The complaint against the Colosimos was eventually dismissed for reasons not in issue in the controversy between the parties to the pending litigation. However, it is interesting to note that the Colosimos had, in part, based their defenses on the grounds that

they had become connected with Elite due to the fraud practiced upon them by the Diorios. Had they not been induced to become connected with the defunct Elite, *a fortiori*, they never would have been called upon to execute the guarantees to Kreisler-Borg.

The petitioners have made an additional claim, on page 5 of the petition, which had been raised in the courts below. This additional claim is that a single lawyer would represent them all, which lawyer turned out to be Joseph C. Matera, Esq., and that when they went to Puerto Rico the litigation would be actively defended.

To say the least, this is not very candid. Joseph C. Matera, Esq., never represented all of the defendants. *(R-4,5)* The claims of fraud, ultimately raised by

the Colosimos against the Diorios, hardly supports their unsubstantiated assertions. The court below found the claims not credible. *(R-1, Pet. 5a)* There were several substitutions of attorneys on the part of the defendants, all of which were on file in the Westchester County Court House. They were available to the Court on the motion to vacate. The various appearances by the different attorneys for the defendants are recited in the body of the 1970 default judgment, which is annexed as part of respondent's appendix. *(R-4,5,6)*

In opposing the first application to vacate the judgment, made in the New York Supreme Court in 1979, counsel for Kreisler-Borg stated in his affirmation to the Court, that neither one of the Diorios, nor their counsel, had set

forth the Diorios' current residence or business addresses. Although the Diorios have had ample opportunity to do so, they have not been willing to disclose any of their addresses from 1970 to the date of the preparation of this brief in opposition to their petition. V. David Levitt, Esq., the attorney who has represented them in all of the proceedings from 1979 to date (except for the Petition for the Writ now before this Court), has maintained that he does not know their present residence or business address.

Neither Kreisler-Borg, nor its counsel, had received any information concerning the petitioners since 1970, when the default judgment was entered. Late in the summer of 1979, Irving Frank, Esq., who has been counsel for

Kreislor-Borg in all of these proceedings received a telephone call from V. David Levitt, Esq., of Mount Vernon, New York. Mr. Levitt stated he was the new attorney for Thomas G. Diorio. He was representing Diorio as a "favor" for Diorio's employer. He was trying to help Diorio. A credit search against Diorio had revealed the existence of the judgment in favor of Kreisler-Borg. He wanted to obtain a satisfaction of the judgment. His new client, Thomas G. Diorio offer to pay nothing for it. There were discussions. Eventually, Thomas G. Diorio offered to pay $15,000.00 for the full satisfaction of the judgment against both defendants, which now totalled close to $100,000.00, with accrued interest. Kreisler-Borg's counsel made one demand as a pre-condition to acceptance of the offer, namely,

a sworn statement from Thomas and his wife, Sally Diorio, of their financial condition. In fact, he sent Mr. Levitt a set of formal questions customarily used in proceedings to enforce the collection of judgments in New York. Mr. Levitt, counsel for the Diorios, indicated the Diorios would not furnish the information. Even though Mr. Levitt has been the attorney of record for Thomas G. Diorio, in the Supreme Court proceedings, from the time he made the original motion to vacate the judgment in October 1979, through the last application he made for the Diorios to the Appellate Division of the Supreme Court, Second Department in New York, which ended December 4, 1980, for leave to appeal to the Court of Appeals of the State of New York, he has informed counsel for Kreisler-Borg, that he,

Mr. Levitt, does not know the residence or business address of either one of the Diorios who are the petitioners before this Court.

The Diorios have allowed the time within which to appeal to the Court of Appeals of the State of New York to lapse without attempting to perfect that appeal. Application for leave to appeal to that Court would have had to be made, at the latest, by January 4, 1981. New York CPLR §§ 5513 (b); §§ 5601, 5602.

The petitioners made absolutely no effort at any time to comply with the New York Statutes, which are designed to relieve a judgment debtor of excusable default. The statute permits a debtor a reasonable opportunity to obtain justice, provided he is acting

in good faith.

The Statute provides in part:

"Rule 5015. Relief from judgment
(a) On Motion. The Court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interest person with such notice as the court may direct, upon the ground of:

1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry;

. . .

4. lack of jurisdiction to render the judgment or order; . . . "

POINT I

THE PETITION FAILS TO STATE ANY FACTS SUFFICIENT TO RAISE AN ISSUE OF LAW WITH RESPECT TO DUE PROCESS.

The petition cites a large number of cases which amplify the meaning of

"due process". Each of those cases are clearly distinguishable from the case at bar. As indicated in respondent's statement of the case, there was notice given, the notice was actually received by the petitioners. They no longer denied the receipt of the two notices after being confronted with the written postal receipts. The notices met the test prescribed by this Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306. 94 L Ed 2d 865 (1950), which also arose in New York State. The petitioners could not deny that the notice was reasonably calculated to apprise them of the pendency of the action. They could not deny they had appeared by attorney. Both their own counsel and counsel for the plaintiff notified them in writing that they had

30 days to retain new counsel, which they ignored. Then, they made a claim of a vague "understanding" that one lawyer would defend them all. But, this claim was neither borne out by the facts, nor was it credible. The petitioners would now have the Court believe they were innocent, naive, unsophisticated people with no experience in the field of litigation. *(R1,2; Pet. A,5)* The facts are otherwise. This is self-evident, when it appears that the respondent, Kreislor-Borg, has been required to oppose their claims from 1963 to date. They have tried to manipulate the Federal Courts. *(page 8 supra)* When Philip A. Diorio first filed his petition in Bankruptcy in 1965, he stayed the State Court action. The manner in which the present petition is prepared indicates the same

kind of callous disregard of the judicial system with an attempt to manipulate this Court as well.

CONCLUSION

The proceedings in the Courts below were conducted properly. The Diorios had received actual written notice of what was taking place at all times. They chose to ignore the various notices they received. The Court, on their belated application made nine years after the fact, examined their claims of lack of notice. On the basis of the written proof submitted by the respondent, which the petitioners made no attempt to contradict, the Court found that the petitioners had callously disregarded the workings of the judicial system and were guilty of laches. The

findings of the Court below are re-enforced by the manner in which their petition was presented to this Court in what appears to be a further attempt to manipulate the judicial system for their own purposes.

The petition should be denied in all respects with costs to the respondents.

Respectfully submitted,

FRANK & FRANK
Attorneys for Respondent
11 Park Place
New York, N.Y. 10007
(212) 962-5387

IRVING FRANK
Of Counsel
11 Park Place
New York, N. Y. 10007
(212) 962-5387

MICHAEL J. MARINO
With him on the Brief

ORDER APPEALED FROM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

- X

KREISLER-BORG CONSTRUCTION CO., INC.,

Plaintiff,

-against-

ELITE CONCRETE CONSTRUCTION CORP., PHILIP A. DIORIO, THOMAS G. DIORIO, JOSEPH L. COLOSIMO and ANTHONY R. COLOSIMO,

Defendants.

- X

SLIFKIN, J.,

Defendants Diorio move to reargue motion seeking to vacate a default judgment. The Court grants the motion for reargument and upon reargument adheres to its original terms.

The judgment by default sought to be vacated was entered by the Clerk of the Court by an Order of Justice M. Fanelli dated October 22, 1970 by reason of the failure of defendants

to proceed to trial in Trial Term Part II on the 5th day of October, 1970. Pursuant to the said Order, the Judgment was entered on the 29th day of October, 1970. There is nothing in the moving papers to distrub the presumption of regularity surrounding the entry of Judgment herein. Further, the bulky and voluminous file discloses an intricate pattern of litigation which resulted in the Order and Judgment above referred to. For the orderly administration of justice, under the circumstances, the movants are guilty of laches and the relief sought must be denied.

So Ordered.

Dated: December 20, 1979
White Plains, New York

MORRIE SLIFKIN
MORRIE SLIFKIN
Justice Supreme Court

"Entered 12/21/79
Westchester County
Clerk's Office "

DEFAULT JUDGMENT WHICH
PETITIONERS SOUGHT TO VACATE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

(Same Title)

Index No.:
9072/64

DEFAULT
JUDGMENT

The Summons and Verified Complaint in the above-entitled action having been personally served upon the defendants as follows: ELITE CONCRETE CONSTRUCTION CORP., on May 15, 1963, on PHILIP A. DIORIO, on May 18, 1963, THOMAS G. DIORIO, on May 15, 1963, JOSEPH L. COLOSIMO, on May 18, 1963, and upon ANTHONY R. COLOSIMO, on May 18, 1963, and it appearing that the defendant ELITE CONCRETE CONSTRUCTION CORP., having failed to appear, answer or

otherwise move or raise any objection in point of law with respect to the Complaint, although its time to do so has fully expired is in default; and it appearing that the defendants PHILIP A. DIORIO and THOMAS G. DIORIO and ANTHONY R. COLOSIMO appeared in this action and interposed an answer by their attorney JESSE ROTHMAN, ESQ., and that thereafter the said JESSE ROTHMAN, ESQ., was duly substituted on November 30, 1964, as their attorney, by JOSEPH C. MATERA, JR., ESQ., and that thereafter by an Order of the Honorable HUGH C. COYLE, Justice of this Court, dated December 5, 1968, the said JOSEPH C. MATERA, JR., ESQ., was permitted to withdraw as the attorney for the said defendants, with leave to the said defendants to obtain new counsel; and the defendants PHILIP A. DIORIO and THOMAS G. DIORIO, having failed to obtain

new counsel and having defaulted by their failure thereafter to appear either in person or by attorney upon the trial of this action after due notice, and

IT FURTHER appearing the defendant JOSEPH L. COLOSIMO, having appeared in this action by CERRATO, NAYOR and EDMISTON, ESQS., and thereafter the said attorneys for this defendant having been substituted by DEL BELLO and BELKIN, ESQS., who appeared for the defendant JOSEPH L. COLOSIMO and who appeared also for the defendant ANTHONY R. COLOSIMO; and it further

APPEARING, that the attorneys DEL BELLO and BELKIN, ESQS., were substituted by ARTHUR I. TRAGER, ESQ., who appeared as attorney for the defendants JOSEPH L. COLOSIMO and

ANTHONY R. COLOSIMO; and it further

APPEARING, that a notice to Restore this case to the calendar for Trial on November 3, 1969, was duly served upon the defendants on October 22, 1969, and the case having been regularly placed upon the Trial Term calendar of this Court and it having been reached in its regular order for trial and the same having been adjourned by the Court, at successive terms of the Court and duly reached for trial at an adjourned Term of the Court held on October 5, 1970, at Trial Term Part II before Honorable Mr. Justice GEORGE M. FANELLI, and FRANK & FRANK, ESQS., IRVING FRANK, of counsel, attorneys for the plaintiff, having moved the case for trial on the said dates, and all the defendants having failed to appear upon

the trial of the said action, either in person or by attorney, and the Court having granted the plaintiff's motion for judgment by default in favor of the plaintiff having filed proof of service of the summons and the amended verified complaint and proof by affidavit of the facts constituting the claim and the amount due and upon the failure of the defendants to appear upon the trial, when the above named cause was reached and called for trial.

NOW, on motion of FRANK & FRANK, ESQS., IRVING FRANK, of counsel, attorneys for plaintiff, it is hereby

ADJUDGED, that KREISLER-BORG CONSTRUCTION CO., INC., the plaintiff, having its principal place of business at 97 Montgomery Street, Scarsdale, New York, do recover ELITE CONCRETE CONSTRUC-

TION CORP., having its principal place of business at 712 Yonkers Avenue, Yonkers, New York, defendant, and PHILIP A. DIORIO, residing at 1351 Wilson Avenue, Santurce, Puerto Rico, defendant, and THOMAS G. DIORIO, residing at 1351 Wilson Avenue, Santurce, Puerto Rico, defendant, and JOSEPH L. COLOSIMO, residing at 62 Priscilla Avenue, Yonkers, New York, defendant, and ANTHONY R. COLOSIMO, residing at 1208 Saw Mill Road, Yonkers, New York, defendant, and each of them, the sum of *FIFTY-TWO THOUSAND SIX HUNDRED SIXTEEN and 93/100 ($52,616.93) DOLLARS,* with interest thereon from October 8, 1964, in the sum of *EIGHTEEN THOUSAND NINE HUNDRED FORTY-TWO and 12/100 ($18,942.12) DOLLARS,* together with the sum of *TWO HUNDRED SIX and 40/100 ($206.40) DOLLARS*

costs and disbursements taxed, making in all the sum of *SEVENTH-ONE THOUSAND, SEVEN HUNDRED SIXTY-FIVE and 45/100 ($71,765.45) DOLLARS*, and that the plaintiff have execution therefor.

Dated: White Plains, New York
October ~~23~~ 29th, 1970
E.N.V.

EDWARD N. VETRANO
Edward N. Vetrano
County Clerk

"Filed:

Oct. 29, 1970 at 9:18 A.M.
Edward N. Vetrano
Westchester County Clerk"

POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

POSTMARK OF DELIVERING OFFICE

MAR 1 196

INSTRUCTIONS: Show name and address below and complete instructions on other side, where applicable. Moisten gummed ends, attach and hold firmly to back of article. Print on front of article *RETURN RECEIPT REQUESTED.*

RETURN TO

NAME OF SENDER **FRANK & FRANK**

STREET AND NO. OR P.O. BOX 11 PARK PLACE

POST OFFICE, STATE, AND ZI NEW YORK, N. Y. 10007

EXHIBIT "A"

POD Form 3811 Apr. 1967 55—10—71648-10

IRB v Elite 63

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO.

CERTIFIED NO. 568443

INSURED NO.

1 SIGNATURE OF NAME OF ADDRESSEE (*Must always be filled in*) Thomas

2 SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE DELIVERED 3-1-69

3 SHOW WHERE DELIVERED (*only if requested*)

EXHIBIT "B"

55—10—71648-10 GPO

POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

POSTMARK OF DELIVERING OFFICE

MAR 1 1969

USPO

INSTRUCTIONS: Show name and address below and complete instructions on other side, where applicable. Moisten gummed ends, attach and hold firmly to back of article. Print on front of article *RETURN RECEIPT REQUESTED.*

RETURN TO

NAME OF SENDER

FRANK & FRANK

STREET AND NO. OR P.O. BOX

11 PARK PLACE

POST OFFICE, STATE, AND ZIP CODE

NEW YORK, N. Y. 10007

EXHIBIT "C"

POD Form 3811 Apr. 1967 e55—16—71648-10

K B v Elite 63-22

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO.

CERTIFIED NO. 168442

INSURED NO.

1. SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)

PHILIP DIMON

2. SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

Thomas Shaw

DATE DELIVERED

3-1-69

3. SHOW WHERE DELIVERED (*only if requested*)

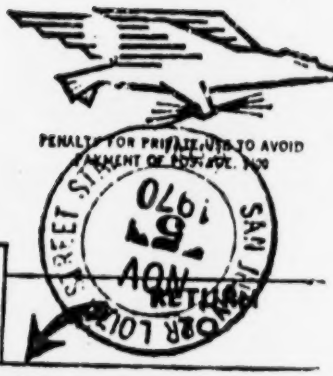
EXHIBIT "D"

—71618-10 GPO

POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

POSTMARK OF DELIVERING OFFICE



Print your name and address below. If you want to restrict delivery, or to have the address of delivery shown on this receipt, check block(s) on other side. Moisten gummed ends and attach this card to back of article.

FCD Form 3811 Apr. 1969 65-16-71513-11

FRANK & FRANK
11 PARK PLACE
NEW YORK, N. Y. 10007

EXHIBIT " E "

Kreindler & Kreindler 65-22 PA Service

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S). REQUIRED FEE(S) PAID.

☐ Show to whom, date and address where delivered

☐ Deliver ONLY to addressee

RECEIPT

Received the numbered article described below.

REGISTERED NO.

CERTIFIED NO.
078730

INSURED NO.

DATE DELIVERED
NOV 5 1970

SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)
1 Phillip Levin

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY
2 Catherine Levin

SHOW WHERE DELIVERED (*only if requested*)

EXHIBIT "F"

POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

POSTMARK OF DELIVERING OFFICE

NOV 5 1970

RETURN TO

Print your name and address below. If you want to restrict delivery, or to have the address of delivery shown on this receipt, check block(s) on other side. Moisten gummed ends and attach this card to back of article.

POD Form 3811 Apr. 1969

FRANK & FRANK
11 PARK PLACE
NEW YORK, N. Y. 10007

EXHIBIT " G "

Kreisler Borg 63-22 7-1 Street

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S). REQUIRED FEE(S) PAID.

☐ Show to whom, date and address where delivered

☐ Deliver ONLY to addressee

RECEIPT

Received the numbered article described below.

REGISTERED NO.

CERTIFIED NO.
078731

INSURED NO.

DATE DELIVERED
NOV 5

1. SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)
Thomas G. Dean

2. SIGNATURE OF ADDRESSEE'S AGENT, IF ANY
Catherine Dean

3. SHOW WHERE DELIVERED (*only if requested*)

EXHIBIT "H"

10-11 847-196 GPO